In the United States Court of Appeals for the Ninth Circuit

No. 15546

BERT RUUD AND EMMA RUUD, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal filed on January 21, 1957 (R. 20-21), from a judgment (R. 14-20) filed on December 15, 1955, awarding just compensation for property condemned by the United States.[1] A motion for new trial was overruled on November 26, 1956 (R. 20). The jurisdiction of the district court was invoked under various Acts of Congress authorizing this proceeding, specified in the petition for condemnation (R. 3-4), including the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C sec. 257. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

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[1] The notice of appeal erroneously states that the judgment was entered on November 15, 1955.

QUESTIONS PRESENTED

1. Whether in a condemnation proceeding there is prejudicial error in the district court's refusal to permit farmers to testify as to the highest and best use of the property and its market value, when the landowners' expert witnesses testify thereto.

2. Whether an award which is based on substantial evidence should be set aside as inadequate.

3. Whether a trial court's ruling on a motion for new trial is reviewable when no abuse of discretion is shown.

STATEMENT

On March 4, 1955, the United States instituted proceedings to condemn the fee simple title to certain lands in Bonneville County, Idaho, for use in connection with the construction, operation and maintenance of the Palisades Dam and Reservoir. This is a Federal Reclamation project, for regulating the flow of the Snake River, a tributary of the Columbia River, for controlling floods, improving navigation, providing for storage and the delivery of the stored waters thereon in connection with the reclamation of arid and semi-arid lands, and the generation, distribution and sale of electric energy as a means of financially aiding such undertakings (R. 3-9). A declaration of taking was filed and there was deposited as estimated compensation the amount of $152,250 (R. 15, 420). The three parcels here involved were owned by appellants, Tract No. 34 containing 2 acres, Tract No. 41 containing 671.12 acres, and Tract No. 77 containing 328.87 acres.

At a trial before a jury for the determination of just compensation, the Government introduced four expert appraisers. Their valuations ranged from $165,769.90

to $171,400 (R. 44-45, 133-135, 162, 180-181, 208-209). In valuing the property, they took into consideration the following factors:

The property was improved by a modern home with running water and a central heating plant, and a number of buildings used in the operation of the property as a farm. There was also an old store building on one tract which had been remodeled into a hotel and was used for renting rooms, and another building used as a cafe. The property was partially fenced. Part of the land was rocky, and the soil on other portions was of a more mellow type and suitable for raising grain or hay and grazing cattle. There were several springs on the property and small lakes had been made of some of them to retain the water in a storage capacity. The property was available to schools and churches, and was served by an all-winter highway. There was daily bus service and mail delivery to the property. Portions of the land were irrigated (R. 39-44, 128-135, 141-145, 159, 164-165, 169-178). It was the opinion of these witnesses that the highest and best use of the land was for dry farming, raising such crops as barley and grass for feeding cattle (R. 39, 158, 207).

Appellants introduced three real estate appraisers who valued the property at $249,350, $252,503 and $255,460.25 (R. 228-229, 316-317, 285-286). Mr. Ruud testified at length as to the improvements to and the natural attributes of the property, the use he formerly had made of the land, and the use to which he believed it adaptable. His total valuation of the three tracts was $300,210 (R. 342-377). Appellants also introduced two witnesses who were farmers in the neighborhood of the subject property (R. 379-380, 388). They testi-

fied as to the soil classifications and its productivity (R. 391-398, 402-408). On objection of the Government because they were not experts on appraising real estate, they were not permitted to testify as to the market value of the property, or to give their opinions as to its highest and best use (R. 385-386, 387).

The verdict of the jury was in the amount of $171,400 (R. 11). On December 15, 1955, a judgment accordingly was entered (R. 14-20). A motion for new trial was overruled on November 26, 1956 (R. 20). This appeal followed (R. 20-21).

ARGUMENT

I

There Was No Prejudicial Error in the Court's Refusal to Allow Farmers to Testify as to the Highest and Best Use of the Property and Its Market Value.

A. *A sufficient showing of prejudice to justify reversal of the trial court by this Court does not appear.* —Appellants argue that the trial court was in error in refusing to permit the witnesses Ellsworth and Smith, who were farmers in the vicinity of the subject land, to testify as to the highest and best use of the property and its market value (Br. 13-19). However, no offer of proof was made of the testimony these witnesses would have given if they had been allowed to testify, and this Court cannot judge the relevancy of the excluded evidence. This Court has stated repeatedly the general principle that a ruling rejecting testimony is not reversible in the absence of an offer of proof. *Fidelity & Deposit Co. of Maryland* v. *Lindholm,* 66 F.2d 56, 60-61 (1933); *Sacramento Suburban Fruit Lands Co.* v. *Miller,* 36 F.2d 922 (1929); *Romeo* v.

United States, 24 F.2d 527 (1928). The same rule was announced by the Supreme Court in *Origet* v. *Hedden,* 155 U.S. 228, 235 (1894); and *Herencia* v. *Guzman,* 219 U.S. 44, 46 (1910); and has been followed in other circuits: *Sorrels* v. *Alexander,* 142 F.2d 769 (App. D.C. 1944); *McVeigh* v. *McGurren,* 117 F.2d 672, 679 (C.A. 7, 1940) certiorari denied, 313 U.S. 573; *Downie* v. *Powers,* 193 F.2d 760, 768 (C.A. 10, 1951); *Hoffman* v. *Palmer,* 129 F.2d 976 (C.A. 2, 1942), affirmed 318 U.S. 109.

Appellants quote a part of Rule 43(a), Federal Rules of Civil Procedure (Br. 14) as to the admissibility of evidence, but ignore the provision in section (c) when evidence is excluded for making a specific offer of what is expected to be proved by the answer of the witness. The obvious purpose of this rule is "to permit the examining attorney to make such record that an appellate court can determine whether there was reversible error in excluding the evidence. * * * If the significance of the excluded evidence is not obvious, the offer of proof must be made to preserve the question on appeal." Not having a record of the proffered testimony the court cannot judge its competence. *Downie* v. *Powers,* 193 F.2d 760, 768 (C.A. 10, 1951).

When the court sustained the Government's objection to the testimony of the witness Ellsworth as to the highest and best use of the property (R. 385), counsel for appellants, instead of stating what he expected to prove, simply stated that he was not qualifying the witness as an expert, but as a man who had been engaged in farming over the years, familiar with land values in that area, and who had discussed values with farmers and who had checked production of crops in

the area and one familiar with valuations (R. 386). He made a similar statement as to the witness Smith (R. 387). Obviously, this Court cannot judge the competency of the excluded evidence, and the ruling offers no ground for reversal. Thus, the statement of appellants' counsel that the witness had discussed values with farmers and had checked the production of crops in the area indicates that the testimony might well have included considerable hearsay. Expert valuation witnesses may properly consider such hearsay, but since the exception rests on the expert's ability to properly weigh such evidence, the exception should not apply to non-experts. *United States* v. *5139.5 Acres of Land,* 200 F.2d 659, 662 (C.A. 4, 1952); *H. & H. Supply Co.* v. *United States,* 194 F.2d 553, 556 (C.A. 10, 1952). Moreover, there is no way of telling in this record what the valuations of those two witnesses would be and, hence, whether appellants would be prejudiced by exclusion of their evidence. It will not do simply to assume that because a party offers the evidence it would have been favorable to him. Cf. *District of Columbia Redev. L. A.* v. *61 Parcels of Land,* 235 F.2d 864 (App. D.C. 1956).

B. *The qualifications of a witness are reviewable only for an abuse of discretion or a clear error of law.*— Whether a witness is qualified to express an opinion on the value of realty and the weight to be given his testimony are preliminary questions for the trial judge, the determination of which is within his discretion, and his decision is conclusive unless there has been an abuse of discretion or a clear error of law. *Chapman* v. *United States,* 169 F.2d 641, 645 (C.A. 10, 1948), certiorari denied 335 U.S. 860; *Love* v. *United States,* 141 F.2d 981, 983 (C.A. 8, 1944); *Hickey* v. *United States,*

208 F.2d 269, 278 (C.A. 3, 1953), certiorari denied 347 U.S. 919. See also: *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U.S. 117, 130 (1920); *Sacramento Suburban Fruit Lands Co.* v. *Soderman,* 36 F.2d 934 (C.A. 9, 1929); Wigmore on Evidence, 3d Ed., Vol. 2, sec. 561. Admittedly, the witnesses Ellsworth and Smith were not expert real estate appraisers (R. 386-387), and the trial court did not abuse its discretion in rejecting their testimony as to the value of the property. Since they were not expert appraisers, they were not qualified to testify as to the highest and best use of the land for any purpose but for farming. An expert appraiser is qualified to testify to the use of the land for various purposes, and although all of the expert witnesses stated that the highest and best use of the land was for farming and cattle raising, there was no error in the trial court's ruling that these two witnesses were not so qualified.

C. *Appellants are not prejudiced by the trial court's refusal to allow Ellsworth and Smith to testify as to the highest and best use of the property and its market value.*—The trial court, particularly in valuation cases, has a wide discretion as to the admission of testimony, so that it is, for example, empowered to limit the number of valuation witnesses for each party and otherwise to keep the evidence within reasonable limitations. We submit that in this case, in view of the other evidence in the case whereby both the landowner and his three expert witnesses had presented all appropriate matters to the jury, it was not an abuse of discretion to exclude the opinions of persons unqualified as experts. *Chapman* v. *United States,* 169 F.2d 641, 643 (C.A. 10, 1948), certiorari denied, 335 U.S. 860; *Dickinson* v. *United*

States, 154 F.2d 642, 643 (C.A. 4, 1946); *Foster* v. *United States,* 145 F.2d 873, 875 (C.A. 8, 1944).

Thus, Mr. Ruud himself, and his three expert appraisers, testified to the highest and best use of the land. His opinion was "as a diversified farm and livestock operation" (R. 367). The witness Groberg, who was an appraiser of considerable experience, and had had experience in the operation of farm land (R. 215-219), testified that the highest and best use for the subject land was "for a diversified farm, principally irrigation farming * * * raising grain, hay and other cultivated and irrigated crops, some pasture, and feeding of livestock." He considered the home ranch most suitable for a rotation program of farming, grain, wheat, barley, oats, and stated that alfalfa hay would be very practical. He also stated: "And I am of the opinion also that there are portions that would be adaptable for raising seed potatoes. It is good soil and good climate and they are being raised in that vicinity. * * * The best seed potatoes come from the higher elevations." He stated that these areas are similar to the Ruud home ranch. (R. 225-228). The witnesses Cook and Naegle gave almost identical opinions as to the highest and best use of the property (R. 284-285, 315-316, 322). Mr. Naegle was the owner of a farm also (R. 310).

Although the trial court did not permit the witnesses Ellsworth and Smith to testify as to the highest and best use of the property in so many words, they were permitted to testify at length as to the classification of the soil on the various portions of the property, and to state what crops would be most productive in the soils as so classified (R. 393-398, 402-405).

Appellants seek to show (Br. 15-19) that there was no evidence at all as to the highest and best use to which

the property could be put, and that the Government was opposed to the admission of any such evidence. On the contrary, its expert witnesses were specifically asked their opinions. Mr. Newell stated (R. 158): "My opinion is that its best use was either for growing of grain or grasses, it could grow hay, I think it could grow alfalfa hay." And further (R. 166): "The production of small grains, hay and pasture would be the principal and best use." Mr. Carruthers stated that his opinion as to the highest and best use of the property was "for the production of small grains and hay." (R. 207). Mr. Dick's opinion was "dry farming, barley, grass pasture for feed" (R. 39). Since the opinions of the Government's witnesses are so similar to those of the landowners' witnesses, all being experts, it is assumed that the witnesses Ellsworth and Smith would have given similar opinions. If not, they certainly should not be admitted in opposition to the expert witnesses offered by both parties.

The Idaho Supreme Court cases relied upon by appellants (Br. 15, 17-18) do not support their contention that there was error in the court's refusal to allow these witnesses to testify. In those cases, witnesses who were not qualified as experts were permitted to testify, the court holding that no prejudicial error had been committed thereby. If the witnesses Ellsworth and Smith had been permitted to testify here, there might well be no abuse of discretion justifying reversal for a new trial, but it by no means follows that the exclusion of such evidence when there are ample valuations by qualified experts constituted error.

II

The Award Is Based on Substantial Evidence, Hence Appellants' Factual Argument Presents Nothing for This Court to Review

Appellants' argument that the verdict is contrary to law and contrary to evidence (Br. 20-23) is an attempt to have this Court conduct a trial *de novo* and, after reweighing the testimony heard by the trial court, find that the award is inadequate. However, the federal appellate courts do not assume the function of retrying the facts and will not set aside condemnation awards if supported by substantial evidence. As this Court stated in *Simmonds* v. *United States,* 199 F.2d 305, 307 (1952):

> Since the question of credibility is for the District Court and the award is within the range of the testimony, the award cannot be set aside on appeal.

See also: *Hoblik* v. *United States,* 151 F.2d 971, 973 (C.A. 8, 1945); *3,535 Acres of Land, etc.* v. *United States,* 146 F. 2d 872, 874 (C.A. 5, 1945); *United States* v. *2.4 Acres of Land, more or less, etc.,* 138 F.2d 295, 297-298 (C.A. 7, 1943); *Murray* v. *United States,* 130 F.2d 442, 444 (App. D.C., 1942).

It is obvious from the evidence that the verdict was not inadequate as a matter of law. The lowest appraisal of the market value of the property by the Government's witnesses was $165,769.90 (R. 44-45), and Mr. Ruud's opinion of market value was $300,210 (R. 372). The jury awarded $171,400 (R. 11). It is plain, therefore, that the award is within the range of the evidence and cannot be said to be inadequate. *Love* v. *United States,* 141 F.2d 981, 982 (C.A. 8, 1944); *Miller* v.

United States, 137 F.2d 592, 594 (C.A. 3, 1943). And because the jury made an award more in line with the appraisals of the Government's witnesses, is not proof that it did not fully consider the testimony of appellants' witnesses. There is no reason that compels the triers of fact to accept any specific valuation where the evidence covers a wide range, nor one that precluded the jury from considering the valuations of the Government's witnesses in the light of other evidence. *Phillips* v. *United States,* 148 F.2d 714, 716 (C.A. 2, 1945); *Stephens* v. *United States,* 235 F.2d 467, 471 (C.A. 5, 1956).

Appellants sought to have the trial court reject the testimony of the Government's expert witnesses by lengthy cross-examination (R. 45-94, 122-124, 136-151, 181-196, 200-201, 203-204, 210-214). They now ask this Court to review the qualifications of these witnesses (Br. 18-19, 21), not on the ground that the trial court has abused its discretion or that there is a clear error of law, but simply because they think their own witnesses were better qualified. This Court can readily see that the trial court had ample grounds for admitting the testimony of these witnesses and believing it. He saw the experts "on whose personal appearance so much depends in an issue like this" (*United States* v. *Delano Park Homes,* 146 F.2d 473, 475 (C.A. 2, 1944)), and since there clearly was no abuse of discretion nor any error of law in the admission of their testimony there is nothing for review.

III

There Was No Abuse of Discretion in the Trial Court's Denial of Appellants' Motion for a New Trial

In *Steiner* v. *United States,* 229 F.2d 745 (1956), certiorari denied 351 U.S. 953, this Court announced the rule (p. 749) that a motion for new trial is "addressed to the district court's discretion. The denial of such a motion is reviewable, if at all, only for an abuse of discretion." There are no fixed rules which the district court must follow, except a consideration of what is just. *Murphy* v. *United States District Court, etc.,* 145 F.2d 1018, 1020 (C.A. 9, 1945); *Boise Payette Lumber Co.* v. *Larsen,* 214 F.2d 373, 380 (C.A. 9, 1954). The Supreme Court set forth the grounds on which a new trial may be based which would invoke the discretion of the trial court, in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 251, (1940): "* * * that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Since the appellants' motion for a new trial raised such questions (R. 11-14), the discretion of the court obviously was invoked. Appellants do not point out any instances of abuse of discretion (Br. 23, 25). Being familiar with all the circumstances of the trial, and considering the entire record, the trial court in denying the motion for a new trial did not abuse its discretion. Its refusal of a new trial was not "inconsistent with

substantial justice." *Everett* v. *Southern Pacific Co.*, 181 F.2d 58, 62 (C.A. 9, 1950).[2]

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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SEPTEMBER 1957.

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[2] Although not expressly discussed as a point of the brief, appellants complain in their statement of points, in their statement of the case, and in their summary (Br. 5-6, 9, 25), of the failure of the court to rule on the motion to dismiss other parties until after the jury had been empaneled and viewed the land. Here again the time when the court will rule on a motion of this sort is plainly within its discretion. There was no abuse here. It was eminently reasonable and conserving of the time of all parties to conduct the argument on that matter while the jury was viewing the property. Moreover, it is difficult to see how appellants could be prejudiced with regard to this collateral matter. It could not, therefore, constitute ground for reversal, particularly in view of the court's instruction to the jury (R. 26).

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